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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-998

HARRY EDMOND FOWLER, JR.,
COUNTRY REALTY COMPANY,
MARILYN HOLLINGSWORTH,
SCENIC SITES, INCORPORATED,
and GEORGE RAYMOND SMITH,

Petitioners,

vs.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the
State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

Petitioners' statement is accepted.

JURISDICTION

Petitioners' statement is accepted.

QUESTIONS PRESENTED

Respondent does not accept the factual premises upon which petitioners' questions are based, and would state the fundamental questions as follows:

1. Where, after the jury is empaneled, the judge sustains the defendants' demurrers to the indictments and allows the state to retry the defendants, does the doctrine of double jeopardy bar retrial?

2. Where the reason for the discharge of the jury is the sustaining of the defendants' demurrers to the indictments, does the fact that the discharge occurred out of the presence of the defendants raise any constitutional issue?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners' statement is accepted.

STATEMENT OF THE CASE

Petitioners' statement is accepted.

REASONS FOR DENYING THE WRIT

Petitioners pray for the issuance of a writ directed to the Supreme Court of the State of Oregon. However, as the petition itself indicates, that court merely denied a petition for discretionary review of petitioners' case (Appendix B to Petition). The highest state court which has ruled on the merits of the case is the Court of Appeals of the State of Oregon (see Appendix A to Petition), and it is therefore the judgment of that court which petitioners should have sought to have reviewed.

The further reasons for denying the writ advanced in this brief are submitted in case the Court chooses to overlook this error and to treat the petition as a petition for writ of certiorari to the proper court, as it has done on occasion. See, *e.g.*, *Callender v. Florida*, 380 U.S. 519 (1965), 383 U.S. 270 (1966).

The petition raises no substantial federal question.

Even if jeopardy would otherwise have attached at the first trial, after the jury was empaneled and the state called its first witness, the action of the trial judge at that time in sustaining the petitioners' demurrers to the indictments and in allowing the state to resubmit the case to the grand jury "annulled" jeopardy under ORS 135.890.[①] See *State v. Jones*, 240 Or 546, 548, 402 P2d 738 (1965). The Oregon Supreme Court has said that where an indictment is dismissed upon demurrer under ORS 135.890,

> ". . . the proceeding stand upon the same footing as if the defendant had never been in jeopardy. *City of Portland v. Stevens*, 180 Or 514, 178 P2d 175 (1947)" *State v. Jones*, *supra* at 548; accord *State v. Nichols*, 236 Or 521, 527-528, 388 P2d 739 (1964).

Moreover, it is well-recognized that a subsequent prosecution is not barred where a defendant obtains the dismissal of an indictment during trial and the discharge

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① "135.890 Proceedings not constituting former acquittal. If the defendant was formerly acquitted on the ground of a variance between the indictment and the proof, or if the indictment was dismissed upon a demurrer to its form or substances or discharged for want of prosecution, without a judgment of acquittal or in bar of another prosecution, it is not an acquittal of the same crime."

ORS 135.890 has since been repealed and reenacted, in substance, as ORS 131.535.

of the jury, or where he procures a reversal or mistrial. See, *United States v. Tateo*, 377 US 463 (1964); *Vaccaro v. United States*, 360 F2d 606 (5th Cir. 1966); *Commonwealth v. Stallard*, 237 Ky 166, 35 SW2d 21 (1931) *Carroll v. State*, 50 Tex Crim 485, 98 SW 859 (1906).

In the present case, the fact that the trial judge, after having sustained the demurrers, discharged the jury outside the petitioners' presence is immaterial. The reason for the general rule that the jury should be discharged in the presence of the defendant is to give the defendant an opportunity to object to the discharge. *State v. Chandler, et al*, 128 Or 204, 208-209, 274 P 303 (1929). The reason for the general rule is therefore inapplicable where the defendant procures the dismissal of the indictment and the discharge of the jury.

This Court's discussion of a defendant's privilege to be present at trial is appropriate here:

> ". . . Nowhere in the decisions of this court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow. . . ." *Snyder v. Massachusetts*, 291 US 97, 106-107 (1933).

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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April, 1975